Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

M. A.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of K.A., A Child,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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41PP

QUESTION PRESENTED

Has the State met the due process requirement of the Fourteenth Amendment, where in a dependency and neglect case the trial court found by clear and convincing evidence the father sexually abused his daughter; the trial court ordered the father to undergo a sexual abuse evaluation and complete therapy as recommended; said therapy requires the father to admit to the sexual abuse and risk criminal prosecution in violation of his Fifth Amendment right to remain silent; and, then the trial court used father's refusal to admit and complete sexual abuse therapy as a basis to find noncompliance with the treatment plan and terminate the father's parental rights?

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PETITION FOR WRIT OF CERTIORARI

M.A. respectfully petitions for a writ of certiorari to review the decision of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals, (Appendix A, *infra*), was not selected for official publication. The District Court of Larimer County issued written findings and order terminating M.A.'s parental rights to his minor child, K.A., which are reproduced at Appendix D, *infra*. The order of the Colorado Supreme Court denying discretionary review is reproduced at Appendix E, *infra*.

JURISDICTION

The Colorado Court of Appeals entered its judgment on July 31, 1997. (Appendix A, *infra*, at A-1). The Colorado Supreme Court entered its order denying discretionary review on December 22, 1997. (Appendix E, *infra*, at E-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND COLORADO REVISED STATUTES

Amendment V to the Constitution of the United States provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment XIV to the Constitution of the United States provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Colorado Revised Statutes, Children's Code, Title 19, Article 3, Dependency and Neglect, § 19-3-304 and § 19-3-604 are reproduced at Appendix F, *infra*.

STATEMENT OF THE CASE

In May, 1994, the Assistant County Attorney for Larimer County, on behalf of the People of the State of Colorado, filed a Petition Neglected Or Dependent Child in the interest of a minor child, K.A., in the District Court of Larimer County, Colorado. M.A., Petitioner, is the natural father of K.A. On September 7, 1994, Petitioner appeared in District Court for an Adjudicatory Hearing, whereupon, Petitioner admitted to allegation "E" of the People's Petition which states that the environment of the Child, [K.A.], was injurious to her welfare. Based upon Petitioner's admission, the Court adjudged the Minor

Child, K.A., dependent and neglected. (Appendix B, *infra*, at B-2).

On February 10, 1995, a hearing was held before the District Court to determine an appropriate treatment plan. A treatment plan was adopted by the court, and a part of the plan was for M.A. to have an evaluation for sexual abuse issues and follow up treatment if recommended. (Appendix D, *infra*, at D-5). The evaluator did recommend therapy, but suggested that successful treatment would require M.A.'s active participation, including his admission to having perpetrated acts of abuse. Such an admission would have triggered Colorado's mandatory child abuse reporting statute, C.R.S. § 19-3-304, (Appendix F, *infra*, at F-1), requiring the therapist to report to local law enforcement. A report to law enforcement, in turn would carry with it a real possibility of criminal prosecution. Petitioner did not seek treatment addressing the sexual abuse concerns and continued to deny the allegations of abuse. (Appendix D, *infra*, at D-6).

On July 13, 1995, the Petitioner appeared before the District Court for a Permanency Plan addressing the placement of the minor child. The court adopted a Permanency Plan which included the termination of parental rights and that the child be made available for adoption. The court further ordered the People to continue to make reasonable efforts to reunify the child and her family. (Appendix C, *infra*, at C-3).

On January 22-24, 1997, the parties appeared in District Court on the People's Motion To Terminate the Parent-Child Legal Relationships existing between the child,

K.A., and Respondents M. A. and M.B., the child's biological mother. On January 31, 1997, the court entered Findings and Orders RE: People's Motion To Terminate Parental Rights, whereby the court terminated the parental rights of both parents. (Appendix D, *infra*, at D-4 and D-8).

On appeal, Petitioner alleged four errors in the trial court's termination of his parental rights. Alleged error number two pertains to the trial court's termination based upon M.A.'s failure to comply with the treatment plan because of his failure to pursue sexual abuse treatment which treatment would have required him to admit to sexually abusing his daughter. The court's finding of noncompliance was based on Petitioner's refusal to admit he had sexually abused his child and complete therapy. (Appendix A, *infra*, at A-5). The trial court found, by clear and convincing evidence, Petitioner had sexually abused his daughter. The Court of Appeals found no error, holding that the record in this matter established "that the trial court's finding of noncompliance was premised on father's failure to secure treatment, an express treatment plan requirement, and not on a surreptitious requirement that he admit to having sexually abused the child." (Appendix A, *infra*, at A-6). The Court of Appeals affirmed the judgment.

Petitioner respectfully submits that the Court of Appeals' decision puts him in the constitutionally untenable position of having to choose between his Fifth Amendment right against compelled self-incrimination and his Fourteenth Amendment right to maintain the structure and integrity of his family free from governmental interference.

This conflict highlights the need for additional guidance by this Court in the areas of compelled self-incrimination to comply with sexual abuse therapy to prevent termination of parental rights; the application of a clear and convincing standard of proof in terminating one's parental rights based upon alleged criminal conduct; and, how the procedure applied in this case violates one's Fifth Amendment right against self-incrimination and one's Fourteenth Amendment right to due process.

REASONS FOR GRANTING CERTIORARI

The trial court ordered a treatment plan requiring father to undergo a sexual abuse evaluation and to follow the recommendations of said evaluation. If the father was to follow such order and recommendation, requiring him to enter sexual abuse therapy, a major component of which is to admit responsibility for the sexual offense(s), this would require the father to waive his Fifth Amendment right against self-incrimination, where such therapy program is required to report said admissions to the local law enforcement agency. By compelling father to successfully complete therapy, i.e., admit to sexual abuse of his daughter, would then expose the father to possible criminal prosecution. If father asserts his Fifth Amendment right to not incriminate himself, thereby not successfully completing therapy, he exposes himself to the risk the trial court will terminate his parental rights for not complying with the treatment plan.

In this case, the trial court entered orders in which M.A. can only comply with by waiving his Fifth Amendment right against compelled self-incrimination. Such an order and requirement deprives M.A. of his fundamental liberty interest in the care, custody and management of his child which is protected by the Fourteenth Amendment. The procedure followed by the trial court denied M.A. of fundamentally fair procedures guaranteed under the Fourteenth Amendment.

THE DISPOSITION OF THIS CASE BY THE COLORADO COURT OF APPEALS DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT VIOLATES PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION AND DENIES PETITIONER OF A FUNDAMENTAL LIBERTY INTEREST OF A NATURAL PARENT IN THE CARE, CUSTODY, AND MANAGEMENT OF HIS CHILD WITHOUT DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In the case at bar, Petitioner's child was adjudicated Dependent and Neglected based upon Petitioner's voluntary admission that the child's environment was injurious to her welfare. (Appendix B, *infra*, at B-2). Subsequently, a treatment plan was ordered by the court; and one of the conditions of the treatment plan was for Petitioner to undergo a sexual abuse evaluation and subsequent treatment as recommended. Petitioner denied committing any sexual abuse or that his daughter was sexually abused.

At the termination hearing, the trial court held the "evaluation clearly found that Petitioner needed treatment but that there may be difficulty in success of any

treatment without appropriate participation by the [Petitioner], including him admitting or facing up to his abusive acts." (Appendix D, *infra*, at D-6). The trial court terminated Petitioner's parental rights pursuant to C.R.S. § 19-3-604 (Appendix F, *infra*, at F-2) as stated in the trial court's Findings and Order RE: People's Motion To Terminate Parental Rights. (Appendix D, *infra*).

A key component of this scenario, yet overlooked by the trial court, is the requirement under Colorado law that any admission by Petitioner of any sexual abuse against his daughter would require the therapist, mental health professional, etc., to report said statements to the nearest law enforcement agency pursuant to C.R.S. § 19-3-304, (Appendix F, *infra*, at F-1), and thereby expose Petitioner to criminal prosecution. By making successful completion of sex offender treatment a condition of the treatment plan, the trial court has placed the Petitioner in a situation where he must admit to the abuse, whether factual or not, in violation of his Fifth Amendment right against compelled self-incrimination. If Petitioner does not admit to the abuse, he cannot successfully complete sex offender treatment. Thus, Petitioner risks having his parental rights terminated for noncompliance with the treatment plan.

This case differs from the due process argument presented in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In *Santosky*, this Court held the nature of minimum process due in parental rights termination proceedings is clear and convincing evidence. *Santosky* did not involve issues of a criminal nature or compelled self-incrimination in violation of the Fifth Amendment. In this matter, the trial court repeatedly

stated there was clear and convincing evidence to support the court's finding that Petitioner had sexually abused his daughter. But, the trial court adopted a treatment plan compelling the Petitioner to admit to sexual abuse and run the risk of criminal prosecution. If this had been a criminal proceeding, the state would have had to prove the allegations beyond a reasonable doubt to a jury of 12.

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), this Court held whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due. This court has historically recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S., at 753-754, 102 S.Ct., at 1395.

In the matter at hand, the trial court has put Petitioner in a position of risking criminal prosecution or having his parental rights terminated. Petitioner respectfully submits that such actions by the trial court are exactly the type of due process and Fifth Amendment issues this Court has concerns with and whether the procedures followed by the trial court satisfy the due process requirements under the Fourteenth Amendment.

CONCLUSION

Because the Colorado Court of Appeals has decided the instant matter in a way which compels Petitioner to waive his right against self-incrimination in order to prevent the termination of his parental rights, in derogation of Petitioner's rights under of the Fifth and Fourteenth Amendments, the Petition for Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

COLORADO COURT OF APPEALS July 31, 1997
No. 96CA0740 **NOT SELECTED FOR PUBLICATION**

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of K.A., a Child,

and Concerning M.A. and M.B.,

Respondents-Appellants.

Appeal from the District Court of Larimer County
Honorable William F. Dressel, Judge
No. 94JV179

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE JONES
Kapelke and Roy, JJ., concur

Harden, Schmidt, Hass, Haag & Hallberg, George H. Hass, County Attorney, Linda K. Connors, Assistant County Attorney, Fort Collins, Colorado, for Petitioner-Appellee

Moore, Smith & Williams, P.C., Michael D. Liggett, Fort Collins, Colorado, for Respondent-Appellant M.A.

R. William Wawro, Fort Collins, Colorado, for Respondent-Appellant M.B.

In this dependency or neglect proceeding, M.A. (the mother) appeals from a trial court judgment terminating the parent-child legal relationship between her and her child, K.A., pursuant to § 19-3-604(1) (a), C.R.S. (1996

Cum. Supp.). M.A. the father appeals from a judgment terminating his parental rights pursuant to § 19-3-604(1)(c), C.R.S. (1996 Cum. Supp.). We affirm.

I. The Mother's Appeal

The mother contends that the evidence was insufficient to support the trial court's finding that she had abandoned the child. We disagree.

Under § 19-3-604(1)(a), C.R.S. (1996 Cum. Supp.), the parent-child legal relationship may be terminated if the evidence establishes, clearly and convincingly, that the child has been adjudicated dependent or neglected and has been abandoned by his or her parent. *People in Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982). For the purpose of the statute, a child is abandoned if the parent has surrendered physical custody of the child for six months or more and has not manifested a firm intention to resume physical custody or to make permanent legal arrangements for the child's care. Section 19-3-604(1)(a)(I), C.R.S. (1996 Cum. Supp.).

Abandonment is a question of intent which is often determined by a parent's actions rather than by his or her words. *Moreau v. Buchholz*, 124 Colo. 302, 236 P.2d 540 (1951). Thus, a parent need not articulate an intent to abandon a child; instead, he or she must give due attention to parental responsibilities to preserve the parent-child legal relationship. In determining whether a parent has abandoned his or her child, the trial court must consider the totality of the circumstances, viewed in light of the child's best interests. *In re Petition of G.D.*, 775 P.2d 90 (Colo. App. 1989).

The credibility of the witnesses and the sufficiency of the evidence, its probative effect and weight, as well as the inferences and conclusions to be drawn therefrom, are within the discretion of the trial court. Thus, a trial court's findings and conclusions will not be disturbed on review if they are supported by the record. *People in Interest of M.S.H.*, 656 P.2d 1294 (Colo. 1983).

Here, the evidence shows that the mother and the father entered into an agreement whereby the father would pay the mother $10,000, plus medical expenses, to bear his child. Thereafter, a child was born in June 1991, and, pursuant to the agreement, the father, who was present for the birth, assumed custody of the child when she was two weeks old.

Thereafter, the mother and the child had little contact. The evidence shows that, in September 1992, the father and the child visited the mother at her place of residence in Minnesota. It also shows that the mother sent the child cards and gifts and telephoned her periodically. These minimal contacts did not enable the child to recognize the mother as her parent.

The evidence further shows that, after the dependency or neglect proceeding was filed in May 1994, the mother came to Colorado, entered an appearance in the proceeding, was advised of her rights, and visited the child one time. A social services caseworker advised the mother of the necessity of participating in a treatment plan if she wanted custody of the child.

The mother, however, refused to participate in a treatment plan, and stated that she was involved in the proceeding solely for the purpose of supporting the

father's bid to regain custody of the child. After the adjudicatory hearing in September 1994, the mother left Colorado, did not inform the caseworker of her whereabouts, and was not heard from again until November 1995 when she wrote a letter requesting visits with the child.

Although the mother testified, during the termination hearing, that she did not intend to abandon the child, the totality of the evidence reveals clearly and convincingly, that the mother did not, at any time after the birth of the child, intend to provide parental care for the child. Accordingly, we conclude that the trial court did not abuse its discretion in finding that the mother had abandoned the child. *See People in Interest of M.S.H., supra.*

We reject the mother's contention that the trial court erred in failing to approve a treatment plan for her. The petition in dependency or neglect and the motion for termination of the mother's parental rights were premised on abandonment. Thus, under § 19-3-604(1) (a), C.R.S. (1996 Cum. Supp.), a treatment plan was not required.

II. The Father's Appeal

A.

The father contends that the trial court erred in terminating his parental rights because the motion for termination was filed prematurely. Specifically, he argues that the requirements of the treatment plan had not been identified at the time the motion was filed because he had not yet completed the sexual abuse perpetrator evaluation. We disagree.

The record reveals that the treatment plan, which was adopted in February 1995, required the father to undergo a sexual abuse perpetrator evaluation and to follow through with any recommended therapy. In July 1995, the social services caseworker decided to file the motion to terminate because the father had not completed the sexual abuse perpetrator evaluation and the child had been in foster care for one year.

Contrary to the father's argument, the requirements of the treatment plan were identified at the time of its adoption, prior to the filing of the motion to terminate. Furthermore, the motion contained factual allegations as to the grounds for termination as required by § 19-3-602(1), C.R.S. (1996 Cum. Supp.). Accordingly, we find no error.

B.

The father next asserts that the trial court erred in terminating his parental rights for failure to comply with the treatment plan. He argues that the trial court's finding of noncompliance was based on his refusal to admit that he had sexually abused the child, an admission which was not required by the treatment plan. We find no error.

To terminate parental rights under § 19-3-604(1) (c), C.R.S. (1996 Cum. Supp.), the trial court must find, among other things, that an appropriate treatment plan, approved by the court, has not been complied with by the parent. It is the parent's responsibility to assure compliance with and success of the treatment plan. *People in Interest of A.H.*, 736 P.2d 425 (Colo. App. 1987).

Here, the treatment plan required the father to undergo a sexual abuse perpetrator evaluation and to participate in treatment if recommended by the evaluator. The evidence adduced at the termination hearing revealed that the father began the evaluation in April 1995; that the evaluation, which was completed in September 1995, recommended ongoing treatment; and that the father did not seek treatment because he disagreed with the evaluation and its recommendations.

Evidence also revealed that the father was unlikely to find a therapist who would treat him if he did not admit that he had sexually abused the child. Notwithstanding this evidence our review of the record establishes that the trial court's finding of noncompliance was premised on the father's failure to secure treatment, an express treatment plan requirement, and not on a surreptitious requirement that he admit to having sexually abused the child. *See People in Interest of A.H., supra.* Accordingly, we find no error.

C.

We reject the father's contention that the department's efforts to rehabilitate him were unreasonable because it did not refer him to specific therapists for individual therapy, sexual abuse perpetrator therapy, and family therapy.

The record reveals that the department referred the father to specific treatment facilities for his evaluations and that these facilities were to arrange for treatment providers if individual or sexual abuse perpetrator therapy was recommended. It further shows that a referral to

a family therapist was not made because the child was not emotionally ready to engage in family therapy. We conclude that these referrals were reasonable. *See* § 19-1-103(89), C.R.S. (1996 Cum. Supp.).

D.

Finally, the father contends that the trial court erred in finding that the treatment plan could not be modified and that there were no less drastic alternatives to termination. We disagree.

In determining a motion for termination of the parent-child legal relationship, the trial court must consider less drastic alternatives, giving primary consideration "to the physical, mental, and emotional conditions and needs of the child." Section 19-3-604(3), C.R.S. (1992 Cum. Supp.); *People in Interest of M.M.*, 726 P.2d 1108 (Colo. 1986).

The evidence adduced during the termination hearing shows that the father disagreed with the recommendation that he participate in sexual abuse perpetrator treatment. It further reveals that if the father agreed to treatment, it would take at least two-to-four years of therapy before he might regain custody of the child. The evidence also shows that the child had been in foster care for more than 18 months and that she needed a safe, stable, and permanent home, with loving, nurturing caretakers as soon as possible.

Finally, the father did not proffer any modifications which would warrant continuation of the treatment plan.

Thus, the trial court's findings as to modification of the treatment plan and less drastic alternatives to termination are supported by the record, and they will not be disturbed on review. *See People in Interest of M.S.H., supra.*

The judgment is affirmed.

JUDGE KAPELKE and JUDGE ROY concur.

APPENDIX B

DISTRICT COURT, LARIMER COUNTY, COLORADO
Case No. 94 JV 179 Courtroom R

ORDER OF ADJUDICATION

THE PEOPLE OF THE STATE OF COLORADO,
IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN and MARTHA BATES,

Respondents.

This matter came before the Court for an Adjudicatory Hearing on September 7, 1994. The People of the State of Colorado were represented by Assistant Larimer County Attorney, Linda K. Dahn. The Respondents, Mark Alan and Martha Bates, were present in Court and represented by Michael Liggett, Attorney at Law. The Child was represented by the Guardian *ad litem*, Mark Schultheiss, Attorney at Law. The Court heard the comments of Counsel and the admissions of the Respondent, Mark Alan, and being adequately advised in the premises herein, HEREBY FINDS:

1. The Court has jurisdiction over the subject matter, personal jurisdiction over the parties and venue is proper.

2. The Respondent, Mark Alan, has admitted allegation "E" contained in Exhibit "A" to the People's Petition

for Dependent or Neglected Child which states that the environment of the Child, Konica Alan, was injurious to her welfare. Such admission was freely and voluntarily made by the Respondent, Mark Alan, and said Respondent was not under any duress or coercion to make such admission at any time.

3. There is a factual basis for the allegation set forth in paragraph 2 above, and such allegation has been sustained by a preponderance of the evidence.

4. Making reasonable efforts to reunify the Child with her family is and shall remain a part of the case plan in this matter. However, as a result of the specific facts of this case, such reunification would be contrary to the best interests of the Child at this time.

5. It is in the best interest of the Child, Konica Alan, that legal custody remain vested with the Larimer County Department of Social Services for appropriate placement in the least restrictive environment available outside of the home which is closest to the parents' home.

IT IS THEREFORE THE ORDER OF THIS COURT THAT:

A. The Child, Konica Alan, is hereby adjudged to be dependent and neglected.

B. Legal custody of the Child shall remain vested with the Larimer County Department of Social Services for appropriate placement in the least restrictive environment available outside of the home which is closest to the parents' home.

Done this 15th day of September, 1994 *nunc pro tunc* September 7, 1994.

BY THE COURT:

/s/ Joseph R. Coyte
District Court Magistrate

APPENDIX C

DISTRICT COURT, LARIMER COUNTY, COLORADO
Case No. 94 JV 179 Courtroom R

PERMANENCY PLANNING ORDER AND ORDER APPROVING ONGOING PLACEMENT

THE PEOPLE OF THE STATE OF COLORADO,
IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN and MARTHA BATES,

Respondents.

This matter came before the Court for adoption of a permanency plan on July 13, 1995. The People of the State of Colorado were represented by Assistant Larimer County Attorney, Linda K. Dahn. The Respondent, Mark Alan, was present and was represented by Michael Liggett, Attorney at Law. The Respondent, Martha Bates, did not appear. The Guardian *ad litem*, Mark Schultheiss, Attorney at Law, represented the Child. The Court has reviewed the permanency plan prepared by Nancy Roath, a social caseworker employed by the Larimer County Department of Social Services and set forth in a letter dated July 6, 1995. The Court has reviewed the file and heard the comments of Counsel and, being adequately advised in the premises herein HEREBY FINDS:

1. The Court has jurisdiction over the subject matter, personal jurisdiction over the parties and venue is proper.

2. Pursuant to §19-3-702(2) C.R.S. appropriate notice of the Permanency Planning Hearing was given to all appropriate parties.

3. Reasonable efforts to prevent out-of-home placement of the Child has been attempted and have failed. Pursuant to the facts and circumstances set forth in the permanency plan prepared by Nancy Roath and set forth in a letter dated July 6, 1995, it would be contrary to the best interests of the Child to be returned to the custody of the Respondents at this time. Further, there is not a substantial probability that the Child will be returned to the physical custody of the Respondents within six months of the date this Order is executed.

4. The People intend to pursue termination of the Parent-Child relationships as a permanent plan in this matter. Although the Court understands the state's need for a permanency plan, it is not appropriate or in the best interests of any party to enter an order terminating the parent-child relationships in this matter without a hearing. Further, although a motion has been filed seeking to terminate the parent-child legal relationships, until such time as that hearing is held, it would not be appropriate to allow the People to abandon efforts to reunify the family.

5. In light of the above, the Court finds the permanency plan prepared by Nancy Roath and set forth in a letter dated July 6, 1995, to be appropriate and in the best interest of the Child.

6. The Court finds that the Child shall be continued in foster care for a period of time not to exceed 180 days without review. The Child's current placement is specifically approved by the Court and shall be reviewed no later than 180 days after the execution of this Order.

7. In light of the above, it is appropriate and in the Child's best interests that legal custody of the Child remain vested with the Larimer County Department of Social Services.

IT IS THEREFORE THE ORDER OF THIS COURT THAT:

A. The permanency plan prepared by Nancy Roath and set forth in a letter dated July 6, 1995, is hereby approved as appropriate and in the best interests of the Child. A copy of such plan is attached hereto as Exhibit "A" and by this reference is incorporated into the terms of this decree as though set fully herein.

B. Legal custody is hereby vested with the Larimer County Department of Social Services for appropriate placement in the least restrictive environment available outside of the home which is closest to the parents' home as deemed appropriate by the Larimer County Department of Social Services. This placement shall be reviewed no later than 180 days after the date of execution of this Order.

C. Until such time as a hearing is held on the People's Motion to Terminate the Parent-Child Legal Relationships, the People shall continue to make reasonable efforts to reunify the Child and her family.

Dated this 4th day of August, 1995.

BY THE COURT:

/s/ Joseph R. Coyte
District Court Magistrate

CERTIFICATE OF MAILING

I hereby certify that I placed a true and correct copy of the above and foregoing Permanency Planning Order in the United States mail, postage prepaid, this 22nd day of August, 1995 addressed to:

Michael Liggett
425 W. Mulberry #112
Fort Collins, CO 80521

R. William Wawro
125 S. Howes #1000
Fort Collins, CO 80521

Mark Schultheiss
215 West Oak
Fort Collins, CO 80521

RULE 121

YOU ARE HEREBY NOTIFIED PURSUANT TO THIS COURT'S POLICY AND RULE 121 THAT IF YOU HAVE ANY OBJECTION TO THE FORM OF THIS ORDER, YOU MUST NOTIFY THE COURT WITHIN FIFTEEN (15) DAYS FROM THE DATE OF THE SIGNING OF THE ORDER. IF NO OBJECTION IS RECEIVED BY THE COURT WITHIN FIFTEEN (15) DAYS FROM THE DATE OF THE SIGNING OF THE ORDER, THE ORDER SHALL REMAIN IN EFFECT IN THE FORM IT WAS SIGNED.

/s/ Christine Seneca

APPENDIX D

DISTRICT COURT, COUNTY OF LARIMER,
STATE OF COLORADO

CASE NUMBER 94 JV 179, Courtroom 2

FINDINGS AND ORDERS RE: PEOPLE'S MOTION TO TERMINATE PARENTAL RIGHTS

THE PEOPLE OF THE STATE OF COLORADO,
IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN AND MARTHA BATES,

Respondents.

(Filed Jan. 31, 1996)

This matter came on before the Court on January 22-24, 1996 for hearing on People's Motion to Terminate the Parent-Child Legal Relationships existing between the child Konica Alan and the respondents Mark Alan and Martha Bates. The People were represented by Linda K. Dahn and J.S. Haag, Assistant County Attorneys; respondent Mark Alan appeared and was represented by Michael D. Liggett, attorney at law, respondent Martha Bates appeared and was represented by R. William Wawro, attorney at law; and Mark Schultheiss, as guardian ad litem. The Court having reviewed the file, including previous orders made, reviewed exhibits, heard testimony and statements of counsel, makes the following Findings and Orders:

1. The Court has jurisdiction over the subject matter, personal jurisdiction over the parties and venue is proper.

2. The child Konica S. Alan was born June 20, 1991 and is currently four (4) years old.

3. The natural mother of the child is the respondent G. Martha Bates and the natural father is the respondent Mark Alan.

4. On May 4, 1994, the Court authorized the filing of a petition for neglected or dependent child and granted temporary custody of the child Konica Alan to the Larimer County Department of Social Services. The child has resided outside of the parents' home continuously up through the hearing on termination of parental rights and placement so continues until further order of Court.

5. On September 7, 1994, the child was adjudicated to be dependent and neglected based upon admission by the respondent Mark Alan that the environment of the child Konica Alan was injurious to her welfare with a written order of adjudication issued September 15, 1995, *nunc pro tunc* to September 7, 1994. Thereafter, the Court held a number of hearings to determine an appropriate treatment plan and address visitation issues and on February 10, 1995, a hearing was held on the treatment plan with the Court issuing a written Order adopting a treatment plan (deleting proposed element 2) on February 13, 1995.

6. On July 26, 1995, the People filed a motion to terminate the parent-child legal relationship existing between the child Konica Alan and the respondents.

A. RESPONDENT MARTHA BATES

The evidence established that the respondent Martha Bates a.k.a. G. Martha Bates is the natural mother of the child Konica Alan. Ms. Bates has described herself as a "surrogate mother" and has not, subsequent to the birth of the child, provided any care, parenting, significant contact or manifested any intent to provide care or parenting for the child. Ms. Bates did visit with the child early in her life on her birthday and has had a couple of telephone calls and sent some presents or cards. Ms. Bates and the respondent Mark Alan reached an agreement whereby Mr. Alan would pay her the sum of ten thousand dollars ($10,000.00) and her expenses related to the fertilization process, pregnancy and birth. Ms. Bates gave birth to Konica in the State of Minnesota and within weeks turned her over to Mr. Alan who subsequently moved to the State of Colorado. Ms. Bates was advised of the termination of parental rights matter involving not only Mark Alan's status, but hers. Ms. Bates has been represented by either Mr. Liggett or Mr. Wawro throughout these proceedings. Ms. Bates was advised of her rights in this matter including her right to participate in a treatment plan but declined to be involved in any treatment plan with her sole involvement to support Mr. Alan's request that the child be returned to his custody.

The Court finds by clear and convincing evidence that the respondent Martha Bates has abandoned the child Konica Alan; she has not had contact with the child for a period greater than six (6) months and had clearly and convincingly manifested her intent not to obtain physical custody or provide permanent legal arrangements for the care of the child. Further, the evidence

clearly establishes that the respondent Martha Bates is an unfit parent and is unable to provide for the emotional and physical needs of the child Konica Alan and she is unlikely to change within a reasonable period of time so as to render her a fit parent capable of caring for the child. In essence, Ms. Bates has never assumed the role of a parent and never intended to care for the physical or emotional needs of the child but simply engaged in a business enterprise for financial gain by giving birth to the child. There is no less drastic alternative available to the Court other than to terminate the parent-child legal relationship existing between the child Konica Alan and the respondent Martha Bates a.k.a. G. Martha Bates; and it is in the best interests of the child Konica Alan that any parent-child legal relationship existing between her and the respondent Martha Bates a.k.a. G. Martha Bates be terminated.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT:

The parent-child legal relationship, if any, existing between the child Konica Alan and the respondent Martha Bates, a.k.a. G. Martha Bates is hereby terminated and the child and said respondent are divested of all legal rights, powers, privileges, immunities, duties and obligations each with respect to the other, except that this Order shall not modify the child's status as an heir at law.

B. RESPONDENT MARK ALAN

The petition alleging dependency and neglect was based upon alleged physical abuse and ongoing medical and physical neglect of the child while in the care of the

respondent father Mark Alan. The child had numerous bruises and abrasions on her body and exhibited poor general health and a "traumatized demeanor" all as described in the various presentations to the Court including, but not limited to:

> Child shaking or rocking her head or body back and forth for extended periods of time, withdrawing from contact by covering up her face with her hands and arms; exhibiting lack of trust of others, and engaging in excessive masturbation for a child her age.

After the finding of dependency and neglect based upon respondent Mark Alan's admission of an injurious environment, the Court was presented with a treatment plan. Respondent objected to the treatment plan and hearing was held before the Court which approved the treatment plan except for element 2 which required the father to obtain an additional psychological evaluation. The Court found that the father did not need to obtain an additional psychological evaluation but that the other elements, including respondent Mark Alan to have an evaluation for sexual abuse issues and follow up treatment if recommended, was appropriate per the Order of Magistrate Coyte dated February 13, 1995 which is incorporated herein and made a part of these Findings and Order. The evidence presented before this Court was similar to and supported the Magistrate's February 13, 1995 Findings and Order. The evidence clearly and convincingly established both that the child Konica Alan had been subjected to physical abuse, deprivation of appropriate parenting and sexually abused. The evidence was not contradicted and clearly and convincingly established

that the perpetrator of the physical, mental abuse and deprivation was the respondent Mark Alan. Respondent Alan denied committing any sexual abuse or that the child Konica was sexually abused. The majority of the evidence received was directed towards the issue of whether or not the child was sexually abused and respondent as the perpetrator of that abuse.

Based on the evidence presented to the Magistrate, the Magistrate found that the element of the treatment plan requiring respondent Mark Alan to undergo a sexual abuse evaluation and subsequent treatment was appropriate. Respondent Alan contended that he was not appropriately advised of the requirement for sexual abuse treatment. The evidence presented at the termination hearing clearly contradicts respondent's denial of knowledge that it was his responsibility to obtain treatment. The evaluation clearly found that defendant needed treatment but that there may be difficulty in success of any treatment without appropriate participation by the respondent Alan, including him admitting or facing up to his abusive acts. Respondent Alan was not placed in a "catch 22" but clearly had knowledge that a significant element of the treatment plan leading to the child being returned to him or eventual termination evolved around addressing the sexual abuse concerns. Yet respondent Alan chose to ignore this requirement and did not seek out treatment that would address this concern. There was evidence that treatment without admission may present problems but respondent Alan did not even pursue any sexual abuse treatment programs although programs are available to him.

This Court recognizes the difficulties in making a determination by clear and convincing evidence whether a child the age of Konica was sexually abused which is further made difficult by her lack of verbal skills commensurate with a child her age. However, based upon the evidence presented, this Court clearly and convincingly finds that the child Konica Alan was sexually abused and that the perpetrator of that abuse was her father the respondent Mark Alan. Mr. Alan provided the care for the child up until the time she was removed by the People. He and the child resided in either a residence wherein they rented a room or an apartment and throughout her young life the child and respondent slept together on a mattress laid upon the floor. The child was in day care while the respondent worked, but if any of said providers were the individuals responsible for the abuse, then respondent as a responsible parent clearly would have noticed the behavior and responded to that abuse and sought out help. The Court has considered that the child may have been influenced by others once she was taken from respondent's care but such actions would not be responsible for the physical manifestations or conduct of the child evidencing sexual abuse including her outcries at night while asleep and her statements to her therapist Rachel Moriarty.

While respondent Alan has complied with some provisions of the treatment plan, he has failed to comply with the critical element of the Court-adopted treatment plan regarding sexual abuse treatment. The Court finds that the respondent Mark Alan is an unfit parent and remains unable to provide for the emotional and physical needs of the child Konica Alan; it is unlikely that the

conduct, condition or fitness of respondent Alan will change within a reasonable period of time so as to render him a fit parent capable of caring for the child; there are no modifications to the treatment plan which could be developed to enable respondent Alan to become a fit parent capable of caring for the physical and emotional needs of the child within a reasonable period of time; there is no less drastic alternative available to the Court other than to terminate the parent-child legal relationship existing between the child Konica Alan and respondent Mark Alan; and it is in the best interest of the child Konica Alan that any parent-child legal relationship existing between the child and respondent Alan be terminated and said Findings are supported by clear and convincing evidence.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT:

The parent-child legal relationship, if any, existing between the child Konica Alan and the respondent Mark Alan is hereby terminated and the child and respondent Mark Alan are divested of all legal rights, powers, privileges, immunities, duties and obligations each with respect to the other, except that this Order shall not modify the child's status as an heir at law.

C. GUARDIANSHIP AND LEGAL CUSTODY

Guardianship and legal custody of the child Konica Alan is hereby awarded to the People of the State of Colorado with placement to continue with the Larimer County Department of Social Services. This matter shall

be continued to the 16th day of April, 1996 at the hour of 8:45 a.m. for review.

BY THE COURT this 31st day of January, 1996.

William F. Dressel
WILLIAM F. DRESSEL
District Court Judge

CERTIFICATE OF MAILING

This is to certify that on the 31st day of January, 1996, a true and correct copy of the above and foregoing Order was delivered to the attorney of record and parties appearing pro se in the following manner:

For counsel in Fort Collins, who have agreed to such procedure: by placing said copy in the attorney's pick-up box located in the Larimer County Courthouse, 200 West Oak, Fort Collins, Colorado.

For all other counsel, or parties appearing pro se: deposited in the United States Mail with the correct postage affixed thereon.

/s/ Marilyn W. Scheinost

cc: Dahn
Liggett
Wawro
Schultheiss

APPENDIX E

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC800
CERTIORARI TO THE COLORADO COURT OF APPEALS, 96CA0740
DISTRICT COURT, LARIMER COUNTY, 94JV179

ORDER OF COURT

(Filed Dec. 22, 1997)

M.A.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO

Respondent,

In the Interest of K.A., A Child.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 22, 1997.

cc:

[seal]

Michael D. Liggett
Amy K. Rosenberg
LIGGETT, SMITH & WILLIAMS
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Fort Collins, CO 80521

Linda K. Connors
Assistant Larimer County Attorney
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Clerk of the District Court
Larimer County Courthouse
P.O. Box 2066
200 West Oak
Fort Collins, CO 80522

Honorable William F. Dressel
Larimer County Courthouse
P.O. Box 2066
200 West Oak
Fort Collins, CO 80522

Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX F

COLORADO REVISED STATUTE

CHILDREN'S CODE

ARTICLE 3

DEPENDENCY AND NEGLECT

19-3-304. Persons required to report child abuse or neglect. (1) * * * any person specified in subsection (2) of this section who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect or who has observed the child being subjected to circumstances or conditions which would reasonably result in abuse or neglect shall immediately report or cause a report to be made of such fact to the county department or local law enforcement agency.

(2) Persons required to report such abuse or neglect or circumstances or conditions shall include any:

(a) Physician or surgeon, including a physician in training;

(b) Child health associate;

* * *

(n) Mental health professional;

* * *

(p) Psychologist;

* * *

19-3-604. Criteria for termination. (1) The court may order a termination of the parent-child legal relationship upon the finding by clear and convincing evidence of any one of the following:

* * *

(c) That the child is adjudicated dependent or neglected and all of the following exist:

(I) That an appropriate treatment plan approved by the court has not been reasonably complied with by the parent or parents or has not been successful or that the court has previously found, pursuant to section 19-3-508 (1)(e), that an appropriate treatment plan could not be devised if a child is under six years of age at the time a petition is filed in accordance with section 19-3-501 (2), no parent or parents shall be found to be in reasonable compliance with or to have been successful at a court-approved treatment plan when:

(A) The parent has not attended visitations with the child as set forth in the treatment plan, unless good cause can be shown for failing to visit; or

(B) The parent exhibits the same problems addressed in the treatment plan without adequate improvement, including but not limited to improvement in the relationship with the child, and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions despite earlier intervention and treatment for the family. The court may receive testimony regarding the family's progress under the treatment plan from the child's physician or therapist,

foster parent, educational or religious teachers, court-appointed special advocate, or caseworker.

(II) That the parent is unfit; and

(III) That the conduct or condition of the parent or parents is unlikely to change within a reasonable time.

* * *

Supreme Court, U.S.
FILED
APR 16 1998
CLERK

No. 97-1544

In The

Supreme Court of the United States

October Term, 1997

M.A.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of K.A., A Child,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LINDA K. CONNORS
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64 pp

QUESTIONS PRESENTED

I. Does this Court have jurisdiction given that the issue of compelled self-incrimination was never raised, nor ruled on, in any state court?

II. Does C.R.S. § 19-3-207(2) statutorily eliminate the issue of compelled self-incrimination?

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C.R.S. § 19-3-207(2) 1

PERTINENT COLORADO REVISED STATUTES

C.R.S. § 19-3-207(2):

> No professional shall be examined in any criminal case without the consent of the respondent as to statements made pursuant to compliance with court treatment orders, including protective orders, entered under this article; except that such privilege shall not apply to any discussion of any future misconduct or of any other past misconduct unrelated to the allegations involved in the treatment plan. The admissibility of testimony as set forth in this subsection (2) shall not be subject to the hearing and notice provisions of subsection (1) of this section.

STATEMENT OF THE CASE

This is a child protection case. Petitioner paid $10,000.00 to a surrogate to bear K.A., the child which is the subject of this action. Following a preliminary investigation of sexual and physical abuse allegations, the Respondent sought and obtained temporary custody of K.A. who was under three years old at the time. Based upon the Petitioner's admission of one of the allegations, the trial court adjudicated K.A. to be dependent and neglected under Colorado law. The trial court adopted the treatment plan proposed by Respondent with one minor exception. The treatment plan required Petitioner to submit to a sexual abuse evaluation and to follow all treatment recommendations. Petitioner picked a therapist he wished to use if treatment was necessary. There was

no evidence at trial that this therapist required Petitioner to admit he was a sexual abuse perpetrator as a condition precedent to therapy. Pursuant to the treatment plan, the therapist would determine if sexual perpetrator therapy was successful. Petitioner did not follow through with the recommended sexual perpetrator treatment. He testified that the reason he did not do treatment was because he disagreed with the evaluator's recommendations. Petitioner never expressed concern that an admission during treatment would trigger Colorado's mandatory reporting statute.

Based on Petitioner's refusal to follow treatment recommendations, specifically his failure to obtain sexual perpetrator treatment, which resulted in noncompliance with the treatment plan, the Respondent asked for termination of the parent-child relationship. Following a three day trial on January 31, 1996, the trial court terminated the parent-child relationship, due to M.A.'s failure to comply with sexual abuse treatment. (Petitioner's Appendix "D" at D-7 and D-8) Petitioner filed for post-trial relief. (Appendix "A") This was denied. (Appendix "B")

On appeal Petitioner alleged the following errors: i) Petitioner claimed termination was inappropriate in light of the timing of the filing of the People's Motion to Terminate, ii) Petitioner claimed he was not given adequate notice of what was required of him under the treatment plan and that he did not have an adequate opportunity to comply with the plan, and iii) Petitioner claimed the trial court erred in its failure to make findings and orders as to modifications of the treatment plan and its failure to impose remedies short of termination.

(Appendix "C") The Colorado Court of Appeals affirmed the trial court's order. On August 13, 1997, M.A. filed a Petition For Rehearing with the Colorado Court of Appeals. (Appendix "D") This was denied on October 2, 1997.

On October 29, 1997, M.A. filed a Petition for Writ of Certiorari with the Colorado Supreme Court. (Appendix "E") This was denied on December 22, 1997. The mandate from the Court of Appeals issued on January 5, 1998.

THIS COURT HAS NO JURISDICTION BECAUSE PETITIONER NEVER RAISED THE FEDERAL QUESTION IN STATE COURT AND THIS PETITION SHOULD BE SUMMARILY DENIED.

No petition for certiorari from a state court proceeding will be entertained by this Court unless the federal question alleged to have been improperly decided by the state court is raised in the state court. *Missouri Pac. R. Co. v. Hanna*, 266 U.S. 184, 45 S.Ct. 36, 69 L.Ed 235 (1924).

A review of the motion for post-trial relief, the order re: post trial motions, Petitioner's brief to the Colorado Court of Appeals, the opinion of the Colorado Court of Appeals, the petition for rehearing before the Colorado Court of Appeals and the petition for certiorari to the Colorado Supreme Court shows:

1. Petitioner never raised the compelled self-incrimination issue; and

2. No Colorado Court decided that issue.

C.R.S. § 19-3-207(2) PROHIBITS USE IN A CRIMINAL CASE OF STATEMENTS MADE TO PROFESSIONALS PURSUANT TO COMPLIANCE WITH COURT TREATMENT ORDERS.

Assuming the compelled self-incrimination issue is properly presented in this Petition, Colorado Statute C.R.S. § 19-3-207(2) destroys Petitioner's argument. State law prohibits any statement made during sexual abuse perpetrator therapy in connection with a treatment plan from being used in any criminal case. The Colorado Legislature has anticipated Petitioner's argument about this issue and statutorily eliminated the issue. There is no violation of a federal right for this Court to consider in this Petition.

CONCLUSION

Because M.A. never raised the issue of compelled self-incrimination with any Colorado court, this Court has no jurisdiction to review the state court order upholding the termination of M.A.'s parental rights. Further, C.R.S. § 19-3-207(2) protects M.A. from compelled self-incrimination. Respondent requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LINDA K. CONNORS AND
GEORGE H. HASS
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Counsel for Respondent

APPENDIX "A"

DISTRICT COURT, LARIMER COUNTY, COLORADO

Case No. 94 JV 179-2

MOTION FOR POST-TRIAL RELIEF PURSUANT TO RULE 59

THE PEOPLE OF THE STATE OF COLORADO, IN THE INTEREST OF:

KONICA ALAN,

A Child,

AND CONCERNING

MARK ALAN and MARTHA BATES,

Respondents.

COMES NOW the Respondent, MARK ALAN, by and through his attorneys, MOORE, SMITH & WILLIAMS, P.C., and respectfully requests this Court enter an Order for Post-Trial Relief Pursuant to Rule 59, and as grounds therefor, states as follows:

1. This Court entered an Order on January 31, 1996, wherein the parent-child legal relationship between the Respondent, MARK ALAN, and the child, KONICA ALAN, was terminated.

2. On or about February 14, 1996, this Court entered an Order for Enlargement of Time within which to file a Motion for Post-Trial Relief.

3. The termination of the parent-child legal relationship between the Respondent, MARK ALAN, and the

child, KONICA ALAN, was improvidently granted as the Motion to Terminate said relationship was filed before the requirements of the Treatment Plan had been completed.

4. The Motion was filed to terminate the relationship before the sexual abuse evaluation required by the Treatment Plan had been completed. This delay was at no fault of the Respondent, MARK ALAN.

5. The testimony at trial revealed that the sexual abuse evaluator, Susan Hansen, did not complete the sexual abuse evaluation until October, 1995, and the Motion to Terminate was filed on July 26, 1995.

6. The Motion to Terminate the parent-child legal relationship between the Respondent, MARK ALAN, and the child, KONICA ALAN, was improvidently granted as the element of the Treatment Plan requiring a sexual abuse evaluation and follow-up was not completed due to no fault of the Respondent, MARK ALAN.

7. It was revealed at trial that neither the Larimer County Department of Social Services nor the sexual abuse evaluator, Susan Hansen, made any recommendation to the Respondent, MARK ALAN, with regard to treatment following the sexual abuse evaluation.

8. It is the burden of the Larimer County Department of Social Services to be an advocate for the reuniting of the family and take all efforts to ensure that reunification, including the timely advisement and guidance of the Respondent, MARK ALAN.

9. The Motion to Terminate the Parent-Child Legal Relationship between the Respondent, MARK ALAN,

and the child, KONICA ALAN, was improvidently granted as it was revealed at trial that the Treatment Plan adopted by the Court was not the real Treatment Plan required by the Larimer County Department of Social Services of the Respondent, MARK ALAN.

10. During the trial, it was revealed that the Treatment Plan of the Court was not the actual Treatment Plan required by the Larimer County Department of Social Services. There was in effect a shadow Treatment Plan that the Department required. This Treatment Plan required a full admission by the Respondent, MARK ALAN, of sex abuse and follow-up treatment.

11. This shadow Treatment Plan was never articulated by the Larimer County Department of Social Services nor reduced to a Court Order. Thereby, the Respondent, MARK ALAN, was never given an honest opportunity to comply with the required Treatment Plan or request additional amendments of the real Treatment Plan.

12. The Motion to Terminate the Parent-Child Legal Relationship between the Respondent, MARK ALAN, and the child, KONICA ALAN, was improvidently granted as the evidence of sexual abuse did not rise to the level of "clear and convincing evidence."

13. The Court disregarded, in its entirety, all evidence provided by the Respondent, MARK ALAN, with regard to the insufficiency of the finding that the child had been sexually abused and that this abuse had been perpetrated by the Respondent, MARK ALAN.

14. The Court improvidently granted the Motion to Terminate the Parent-Child Legal Relationship between the Respondent, MARK ALAN, and the minor child, KONICA ALAN, as the evidence in its entirety was insufficient to support the findings made by the Court.

15. The evidence did not reach a level of "clear and convincing" with regard to the Court's findings and the termination of the parent-child legal relationship.

16. The Court improvidently granted the Motion to Terminate the Parent-Child Legal Relationship between the Respondent, MARK ALAN, and the child, KONICA ALAN, by failing to make sufficient findings as to possible modifications or less drastic alterations that might have been applied in the Treatment Plan.

17. The evidence revealed that the Larimer County Department of Social Services never made sufficient efforts to deal with possible modifications or less drastic alternatives with regard to the Treatment Plan. This is in part due to the existence of a "shadow Treatment Plan" that existed.

18. The Larimer County Department of Social Services did not faithfully or fully discharge their duties pursuant to statute, and the result was an improper termination of the parent-child legal relationship between the Respondent, MARK ALAN, and the minor child, KONICA ALAN.

WHEREFORE, Respondent, MARK ALAN, respectfully requests this Court grant the Respondent a new trial on the issue of termination of parental rights or, in the alternative, on the issues concerning modifications or less

drastic alternatives in the Treatment Plan; that the Court amend its Judgment and deny the Motion to Terminate the Parent-Child Legal Relationship and require continuation of the Treatment Plan; that the Court enter new Treatment Plan Orders requiring the Larimer County Department of Social Services to comply with the statutory requirements and continue the process of reunification of the family; and for such other and further relief as the Court deems necessary.

DATED this 27th day of February, 1996.

MOORE, SMITH & WILLIAMS, P.C.

By: Michael D. Liggett
Michael D. Liggett #8373
Attorney for Respondent Alan
425 West Mulberry, Suite 112
Fort Collins, Colorado 80521
Telephone: (970) 482-9770
Facsimile: (970) 482-0339

STATE OF COLORADO)
) ss. VERIFICATION
COUNTY OF LARIMER)

I, MARK ALAN, after being first duly sworn upon oath state that I am the Respondent in the herein action, that I have read the foregoing **MOTION FOR POST-TRIAL RELIEF PURSUANT TO RULE 59**, and the facts contained therein are true to the best of my information, knowledge and belief.

/s/ Mark Alan
Mark Alan

Subscribed and sworn to before me this 27th day of February, 1996, by Mark Alan.

Witness my hand and official seal.

My Commission expires: February 12, 1999

/s/ Mary Richling
Notary Public

Certificate of Delivery

I hereby certify that I have served a true and correct copy of the foregoing MOTION FOR POST-TRIAL RELIEF PURSUANT TO RULE 59, by hand delivering a copy of the same to the following this 28th day of February, 1996:

Linda K. Dahn
Assistant County Attorney
Ninth Floor, First Tower Building
Fort Collins, CO 80521

Mark Schultheiss
Guardian ad litem
215 West Oak Street
Fort Collins, CO 80521

William Wawro
Attorney for Respondent Bates
205 South Meldrum
Fort Collins, CO 80521

/s/ Mary Richling

APPENDIX "B"

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO

CASE NUMBER 94 JV 179, Courtroom 2

ORDER RE: POST TRIAL MOTIONS

THE PEOPLE OF THE STATE OF COLORADO, IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN AND MARTHA BATES,

Respondents.

The Court having reviewed respondent Mark Alan's Motion for Post-Trial Relief pursuant to Rule 59, People's Objection, the Court's Findings and the evidence presented, denies defendant's Motion for Post-Trial Relief. Respondent Mark Alan was aware of the requirement of the plan to obtain appropriate sexual abuse evaluation and counseling. The Motion for Termination of Parental Rights was pending before this Court and respondent had more than sufficient time to begin and either make progress towards or complete treatment. Respondent Mark Alan was unequivocally made aware of the requirement for the treatment and where treatment could be obtained. However, the respondent Mark Alan refused to be involved in sexual abuse treatment even after the matter was brought before the Court and his position

rejected. The evidence clearly and unequivocally established that regardless of any requirement, respondent Mark Alan was not going to participate in any treatment regarding sexual abuse and during the trial continued his denial even though the evidence clearly and convincingly established the existence of sexual abuse and his being responsible therefor.

The Findings of the Court are supported by clear and convincing evidence and the termination of the parent-child legal relationship was the only relief available to the Court.

This was not a situation that respondent was mislead, the Department of Social Services had its own agenda other than assisting in completing an appropriate treatment plan, or that there existed a so called "shadow treatment plan" as alleged with ulterior motives on the part of the Department of Social Services. Defendant's Motion for Post-Trial Relief is denied.

BY THE COURT this 11th day of March, 1996.

/s/ William F. Dressel
WILLIAM F. DRESSEL
District Court Judge

CERTIFICATE OF MAILING

This is to certify that on the 11th day of March, 1996, a true and correct copy of the above and foregoing Order was delivered to the attorney of record and parties appearing pro se in the following manner:

For counsel in Fort Collins, who have agreed to such procedure: by placing said copy in the attorney's pick-up box located in the Larimer County Courthouse, 200 West Oak, Fort Collins, Colorado.

For all other counsel, or parties appearing pro se: deposited in the United States Mail with the correct postage affixed thereon.

/s/ William F. Dressel

APPENDIX "C"

COURT OF APPEALS, STATE OF COLORADO

Case No. 96 CA 740

OPENING BRIEF OF RESPONDENT-APPELLANT, M.A.

THE PEOPLE OF THE STATE OF COLORADO,

Appellee,

In the Interest of:

K.A., A Child,

And Concerning:

M.A.,

Respondent-Appellant,

and

M.B.,

Respondent-Appellant,

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT
LARIMER COUNTY DISTRICT COURT

Trial Case No. 94 JV 179-2
Trial Court Judge: Honorable William F. Dressel

ATTORNEY FOR RESPONDENT-APPELLANT, M.A.

MOORE, SMITH & WILLIAMS, P.C.
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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the trial court err in granting the Motion to Terminate the Parent-Child Legal Relationship when said Motion was filed before the requirements of the Treatment Plan had been identified by The People and before any recommendations had been made by The People to Respondent-M.A. concerning the element relating to sexual abuse evaluation and treatment.

B. Did the trial court err in granting the Motion to Terminate the Parent-Child Legal Relationship when it was revealed that the Treatment Plan adopted by the court was not the "real" Treatment Plan required by The People.

C. Did the trial court err in its failure to make findings and orders as to possible modifications of the Treatment Plan or impose less drastic alternatives than termination.

II. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This appeal arises from a Neglected or Dependent Child action filed by the Larimer County Attorney on behalf of The People of the State of Colorado. The action was filed on behalf of a Child-K.A., concerning Respondents-M.A. and M.B. The Larimer County District Court, Honorable William F. Dressel, entered Findings and Orders on January 31, 1996. The Findings and Orders terminated the parental rights of M.A. and M.B. The

Respondent-M.A. appeals the propriety of the order terminating his parental rights to the Child-K.A.

References to the record on appeal will be by volume (Vol.), page (p.), and line (l.). The Respondent-Appellant will be referred to as "Respondent-M.A.", and the People of the State of Colorado-Appellee, will be referred to as "The People."

B. Statement of the Facts.

The People filed a Petition for Neglected or Dependent Child on May 4, 1994. The Petition made specific allegations in Exhibit "A" attached to the Petition. (Vol. I, pp. 1-4).

The trial court conducted an adjudicatory hearing on September 7, 1994. At that hearing, the Respondent-M.A. admitted allegation "E" contained in Exhibit "A" to The People's Petition for Dependent or Neglected Child. That allegation stated that the environment of the Child-K.A. was injurious to her welfare. The trial court further ordered that making reasonable efforts to reunify the child and family should remain a part of the case plan. (Vol. I, pp. 31-32).

On or about September 19, 1994, The People filed a Proposed Treatment Plan with the trial court. (Vol. II, People's Ex. 2). This Proposed Treatment Plan was objected to by the Respondent-M.A. (Vol. I, pp. 33-34). A hearing was conducted on the Proposed Treatment Plan on February 10, 1995. The trial court, after hearing, adopted a Treatment Plan omitting the portion of Element

II requiring the Respondent-M.A. to undergo additional psychological evaluation. (Vol. I, pp. 44-47).

On March 16, 1995, the Respondent-M.A. filed a Motion to Amend Treatment Plan. In particular, the Respondent-M.A. requested that the evaluation for sexual abuse issues and follow-up treatment, if needed, be conducted by the Center for Human Relationships. (Vol. I, pp. 48-49).

On March 27, 1995, The People filed a partial objection to Motion to Amend Treatment Plan. The People, within this pleading, agreed that the sex abuse evaluation be conducted by the Center for Human Relationships. (Vol. I, p. 50).

On July 26, 1995, The People filed a Motion to Terminate the Parent-Child Legal Relationship. This Motion alleged that Respondent-M.A. had failed to comply with the court-adopted Treatment Plan, that Respondent-M.A. was an unfit parent unable to provide for the emotional and physical needs of the Child-K.A., the conduct of the Respondent-M.A. was unlikely to change within a reasonable time, that there were no modifications to the Treatment Plan available, and that there were no less drastic alternatives available. Due to these allegations, The People requested that the parent-child relationship be terminated between Respondent-M.A. and Child-K.A. (Vol. I, pp. 56-58).

On July 13, 1995, the trial court conducted a hearing on a Permanency Plan. The court entered written orders on August 4, 1995. This order required The People to continue to make reasonable efforts to reunify the child and her family. (Vol. I, pp. 61-63).

On August 10, 1995, the Respondent-M.A. filed a Response to Motion to Terminate. The Respondent-M.A. denied The People's allegations. In pertinent part, the Respondent-M.A. alleged that he began working on the Treatment Plan even before adopted by the trial court and was timely involved in evaluations and treatment as court ordered. Further, the Respondent-M.A. requested that the Motion to Terminate be denied; that he be afforded sufficient time to complete the Plan; that the Treatment Plan might require modification; and that the Treatment Plan had not adequately been evaluated by The People nor had The People communicated with the Respondent-M.A. concerning their evaluation and his performance under the Treatment Plan. (Vol. I, pp. 66-69). A trial on The People's Motion to Terminate the Parent-Child Legal Relationship was conducted by the Honorable William F. Dressel from January 22 through January 24, 1996.

At trial, it was The People's position that the basis for the termination of the parental rights of the Respondent-M.A. was his failure to abide by the element of the Treatment Plan related to sexual abuse. In effect, all remaining elements had been completed by the Respondent-M.A. or were not the grounds for termination of parental rights at trial. (Vol. IV, p. 12, ll. 5-22).

The Treatment Plan in this matter was prepared by Nancy Roath, a caseworker for the Larimer County Department of Social Services assigned to ongoing child protection. She was assigned to the case involving the Child-K.A., in July 1994. (Vol. V, p. 70, l. 19, through Vol. V, p. 71, l. 22). At trial, Nancy Roath testified that Respondent-M.A. had fully completed all contested elements of

the Treatment Plan except the treatment following the sexual abuse evaluation. (Vol. V, p. 77, l. 1 through Vol. V, p. 79, l. 25).

At trial, The People introduced a psycho-sexual evaluation (Vol. II, People's Ex. 1), prepared by Susan Hansen. (Vol. VI, p. 9, ll. 3-6) This evaluation was dated September 24, 1995. The text of the evaluation reveals that Respondent-M.A. was referred to the evaluator on April 5, 1995. (Vol. II, People's Ex. 1, p. 1). During direct examination of Susan Hansen, The People elicited testimony that the evaluation yielded recommendations concerning treatment for Respondent-M.A. Further, these recommendations were set forth in the report received by the court as People's Exhibit "1." (Vol. VI, p. 30, ll. 10-17).

In the course of Susan Hansen's testimony, she acknowledged that the evaluation of Respondent-M.A. began on April 19. (Vol. VI, p. 42, ll. 6-8), that the time for the evaluation needed to be extended as new information was coming from Social Services (Vol. VI, p. 42, ll. 13-25), and that she spoke to Social Services four or five times (Vol. VI, p. 43, ll. 1-5). The last clinical session with Respondent-M.A. was conducted on September 20, 1995, and the report was written on September 24, 1995 (Vol. VI, p. 44, ll. 15-20). In describing her communications with Social Services, Susan Hansen testified that she was never told by caseworker Nancy Roath that it was necessary for Respondent-M.A. to admit to a sexual assault on the Child-K.A. (Vol. VI, p. 44, ll. 4-13).

During the trial, the ongoing caseworker testified that the Motion to Terminate Parental Rights was filed in July 1995, and at that point, the sexual abuse evaluation

had not yet been completed. She further acknowledged that the report was not received by her until September 24, 1995, or thereafter. (Vol. V, p. 183, l. 21 through Vol. V, p. 184, l. 16). Nancy Roath, the ongoing caseworker, also testified on several occasions during the trial that it was her position that the Respondent-M.A. must admit he sexually abused the Child-K.A. and seek therapy before the family could be reunited. Further, this opinion had been maintained by Nancy Roath for a year and a half, beginning two or three months into the case as of July 1994. (Vol. V, p. 190, ll. 7-16; Vol. V, p. 191, ll. 9-15; Vol. V, p. 192, ll. 1-4).

The ongoing caseworker additionally testified that the Treatment Plan did not require Respondent-M.A. to admit he committed sexual assault (Vol. V, p. 191, ll. 22-25), and that she had never proposed an amendment or modification to the Treatment Plan. (Vol. V, p. 192, ll. 19-22). Following the receipt of the recommendations from the sexual abuse evaluation, Nancy Roath did not recommend a therapist to the Respondent-M.A. to aid in compliance with the recommendations of the evaluator (Vol. V, p. 184, l. 11 through Vol. V, p. 185, l. 5) which are contained on pages 8 and 9 of the evaluation (Vol. II, People's Ex. 1). When asked why no recommendation was made, Nancy Roath testified that she was told that the evaluator did not know of any therapists that worked with individuals in denial. (Vol. V, p. 203, ll. 21-25). This information does not appear in any Treatment Plan or evaluation and Ms. Roath testified she never shared this information with the Respondent-M.A. (Vol. V, p. 104, l. 22 through Vol. V, p. 105, l. 19).

The trial court, in its Findings and Orders of January 31, 1996, found that the Respondent-M.A. failed to comply with the critical element regarding sexual abuse; that the Respondent-M.A. was an unfit parent unlikely to change within a reasonable time; that no modifications to the Treatment Plan could be developed to allow Respondent-M.A. to become a fit parent; that no less drastic alternatives were available and that it was in the best interest of the Child-K.A. that the parent-child relationship with Respondent-M.A. be terminated. The trial court's order states these findings are supported by clear and convincing evidence and terminates the parent-child relationship between the Child-K.A. and the Respondent-M.A.

III. SUMMARY OF ARGUMENT

A. The trial court erred in terminating Respondent-M.A.'s parental rights when the Motion to Terminate was filed before the requirements of the Treatment Plan had been identified by The People. At the time of the filing of the Motion, the sexual abuse evaluation had not been completed. The Respondent-M.A. had timely involved himself in the evaluation. The People in effect filed the Motion to Terminate before Respondent-M.A. had knowledge of the requirements and an opportunity to comply.

B. The trial court erred in terminating Respondent-M.A.'s parental rights when he failed to comply with the "real" Treatment Plan required by The People. The "real" Treatment Plan was never approved, adopted nor ordered by the court, nor was the "real" Treatment Plan revealed

to the Respondent-M.A. It was impossible for the Respondent-M.A. to comply with a Treatment Plan that did not conform to the requirements of C.R.S. § 19-3-508.

C. The trial court erred in its failure to make findings and orders as to modifications of the Treatment Plan and/or impose remedies short of termination. The only contested element of the adopted Treatment Plan, at the time of trial, was follow-up treatment to Respondent-M.A. as recommended in the sexual abuse evaluation.

IV. LEGAL ARGUMENT

A. THE TRIAL COURT ERRED IN TERMINATING RESPONDENT-M.A'S PARENTAL RIGHTS WHEN THE MOTION WAS FILED BEFORE THE REQUIREMENTS OF THE TREATMENT PLAN WERE IDENTIFIED BY THE PEOPLE.

Colorado Revised Statute, § 19-3-602 (1) states in pertinent part:

> Termination of a parent-child relationship shall be considered only after the filing of a written motion alleging the factual grounds for termination,. . . .

In the case at hand, the Motion to Terminate the Parental Rights of Respondent-M.A. was filed on July 26, 1995, by The People. In evaluating the Motion, the Court should be guided by the principle that a natural parent has a fundamental liberty interest in the care, custody and management of his child. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). To ensure this principle is followed, the courts require The People to

accord fair procedures to a parent. *B.B. v. People*, 785 P.2d 132 (Colo. 1990). These fair procedures require that The People exercise extreme caution and require strict compliance with the appropriate standards for termination of parental rights. This compliance is a strict necessity. *People in Interest of M.C.C.*, 641 P.2d 306, 308 (Colo. App. 1982).

In the Motion to terminate filed herein, The People allege that the Respondent-M.A. had failed to comply with the court-adopted Treatment Plan; that he was unfit and unlikely to change; that no modifications to the Treatment Plan were possible; and that there were no less drastic alternatives available. (Vol. I, pp. 57-58). At the time the Motion was filed, The People had not yet developed the requirements of the Treatment Plan.

The testimony at trial revealed that the Treatment Plan was completed following the filing by The People of a Partial Objection to Motion to Amend Treatment Plan on March 27, 1995. Following the filing of that pleading, the Respondent-M.A. began a sexual abuse evaluation on April 19, 1995. This evaluation was delayed in its completion by the acts of Larimer County Department of Social Services. (Vol. VI, p. 42, ll. 13-25). The evaluation was completed and a report issued by Susan Hansen on September 24, 1995. This report was received by The People sometime after September 24, 1995.

Prior to the receipt of the recommendations of the sexual abuse evaluation, the requirements of the Treatment Plan were not complete. It is axiomatic that the purpose of a Treatment Plan is to preserve the parent-child relationship by aiding the parent in an effort to

remedy the problems that led to the intervention by The People. *People in Interest of A.E.*, 749 P.2d 450, 452 (Colo. App. 1987), *In Interest of A.G.-G.* 899 P.2d 319, 322 (Colo. App. 1995). In the instant case, The People have alleged failure to comply with the Treatment Plan, parental unfitness and no reasonable likelihood of change before requirements of the Treatment Plan had been fully identified and shared with Respondent-M.A.

C.R.S. § 19-3-604 (1) (c) provides the criteria for termination which were alleged by The People in their Motion to Terminate in this case. The People have not strictly followed the requirements of this statue if they make such allegations before the requirements of an appropriate Treatment Plan have been identified and the Respondent-M.A. given an adequate notice of the conduct he is expected to address and remedy under the Treatment Plan.

B. THE TRIAL COURT ERRED IN TERMINATING RESPONDENT-M.A.'S PARENTAL RIGHTS WHEN HE FAILED TO COMPLY WITH THE "REAL" TREATMENT PLAN.

The Treatment Plan is this case was adopted by the court following a Dispositional hearing conducted on February 10, 1995. This Plan was slightly modified following the Motion to Amend filed by Respondent-M.A. filed on March 16, 1995. However, the Plan ordered and approved by the court was not the "real" Plan used by The People through the actions of the Larimer County Department of Social Services. C.R.S. § 19-3-508 (1) requires the court to approve an appropriate treatment

plan as part of the dispositional phase of a neglected or dependent child action, unless the court finds that an appropriate treatment plan cannot be devised for a particular respondent. (C.R.S. § 19-3-508 (1) (e) (I). Further, C.R.S. § 19-3-604 (1) (c), the criteria alleged for termination in this case, required a finding "that an appropriate treatment plan approved by the court has not been reasonably complied with . . . ". Implicit in these statutes is the principle that the treatment plan must be reviewed and ordered by the court. In order for a respondent to be able to comply, he must have knowledge of the requirements of the treatment plan. The respondent's success in complying with the treatment plan is the key to reunifying the family. The respondent's failure to comply may cause the loss of a fundamental liberty and termination of the parent-child relationship. *B.B. v. People,* 785 P.2d 132, 136 (Colo. 1990).

The purpose of a treatment plan is to aid the respondent in the preservation of the parent-child relationship by helping the respondent remedy the issues that led to the filing of the action. *People in Interest of E.H.,* 837 P.2d 284-289 (Colo. App. 1992). The provisions of the plan must be designed to assist a respondent in identifying and overcoming the problems that led to the adjudication. *In Interest of A.G.-G.,* 899 P.2d 319, 322 (Colo. App. 1995). In the current case, the Respondent-M.A. was never apprised of the "real" Treatment Plan that existed as a shadow with the Larimer County Department of Social Services. At trial, the ongoing caseworker, Nancy Roath, revealed the "real" Treatment Plan. The "real" Treatment Plan required the Respondent-M.A. to acknowledge and admit that he had sexually abused the

Child-K.A. The ongoing caseworker had formed this opinion as of July 1994. (Vol. V, p. 192, ll. 1-4). It was the ongoing caseworker's opinion that before the Respondent-M.A. could be reunified with his child that he must admit that he had abused his child and seek therapy. Nancy Roath, the ongoing worker, had maintained this position for one and one-half years before the termination trial.

The ongoing caseworker's requirement of Respondent-M.A. was never part of a court ordered or approved Treatment Plan. The Respondent-M.A. has been denied the right to have an opportunity to be a part of an appropriate court approved Treatment Plan. In effect, the Respondent-M.A. has been found to be in noncompliance with a Treatment Plan of which he had no knowledge. The performance expected by the ongoing caseworker was part of a shadow Treatment Plan. This Plan was never reviewed by the court nor approved as part of dispositional order. The Larimer County Department of Social Services, through the ongoing caseworker, made it impossible for the Respondent-M.A. to comply with the Treatment Plan, as the "real" Treatment Plan was not approved nor found to be appropriate by the court. In this case, a termination of parental rights should not have been entered when The People, through the Larimer County Department of Social Services, made it impossible for the Respondent-M.A. to comply with the Treatment Plan. *People in Interest of N.F.* 820 P.2d 1128, 1130 (Colo. App. 1991).

C. THE TRIAL COURT ERRED IN ITS FAILURE TO MAKE FINDINGS AND ORDERS AS TO MODIFICATIONS OF THE TREATMENT PLAN AND IMPOSE REMEDIES SHORT OF TERMINATION.

The trial court in this action, by way of its Findings and Orders of January 31, 1996, stated, "There are no modifications to the treatment plan which could be developed to enable Respondent Alan to become a fit parent capable of caring for the physical and emotional needs of the child within a reasonable period of time; there is no less drastic alternative available to the Court . . . ".

The trial court must comply with the statutory criteria for termination and consider less drastic alternatives and modifications before entering an order terminating parental rights. *People in Interest of M.M.*, 726 P.2d 1108, 1123 (Colo. 1986); *People in Interest of A.H.*, 736 P.2d 425, 428 (Colo. App. 1987). The trial court in this matter did make a generalized finding as described above; however, the evidence before the trial court indicated that The People had not followed through with the recommendations of the sexual abuse evaluator (Vol. II, People's Ex. 1, pp. 8, 9), nor the recommendations of the child's therapist. (Vol. V, p. 61, l. 14 through p. 62, l. 4).

Pursuant to C.R.S. § 19-3-604 (2) (n), the court is to consider the reasonable efforts of the child-caring agencies to rehabilitate the parent. In this action, the ongoing caseworker not only maintained a shadow "real" Treatment Plan, she did not make reasonable efforts under the adopted Plan.

The ongoing caseworker is the professional charged with the supervision of the parties involved in the Treatment Plan. Nancy Roath, the ongoing worker, never made recommendations to the Respondent-M.A. once she received the report from the sexual abuse evaluator, nor did she make recommendations to the Respondent-M.A. for individual therapy. Both of these steps appear to be required under the adopted Treatment Plan before reunification could move forward. (Vol. V, p. 205, ll. 9-19; Vol. V, p. 186, l. 7 through p. 187, l. 16).

The trial court in this matter apparently drew the conclusion that there were no less drastic measures despite the fact that the Respondent-M.A. had not been given reasonable opportunity to comply with either the "real" Treatment Plan nor the adopted plan. Under the circumstances of this case, the trial court's conclusion should be supported by specific findings.

V. CONCLUSION

The trial court in this matter erred in terminating the Respondent-M.A.'s parental rights. The People's filing of the Motion to Terminate before the Treatment Plan requirements were identified was inappropriate. The expectation that the Respondent-M.A. would comply with a "real" Treatment Plan that was not court ordered or approved is inappropriate. The failure of the trial court to make specific findings as to modifications or less drastic alternatives based on the evidence was inappropriate. In summary, the Respondent-M.A. was not given a fair and adequate opportunity to comply with the requirements of the Children's Code. The People have failed to

be in strict compliance with the statutes concerning termination of parental rights and the trial court inappropriately entered an order terminating the parent-child relationship between Respondent-M.A. and the Child-K.A.

The Respondent-M.A. respectfully requests this Court of Appeals reverse the decision of the trial court and enter such orders as are appropriate herein.

Respectfully submitted this 16th day of December, 1996.

MOORE, SMITH & WILLIAMS, P.C.

By: /s/ Michael D. Liggett
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Certificate of Mailing

I hereby certify that I have served a true and correct copy of the foregoing RESPONDENT-M.A.'S OPENING BRIEF by placing a copy of the same in the U.S. mail, postage prepaid and properly addressed to the following this 16th day of December, 1996:

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/s/ Mary Richling

APPENDIX "D"

COLORADO COURT OF APPEALS August 13, 1997
No. 96 CA 0740

PETITION FOR REHEARING

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of K.A., a Child,

and Concerning M.A. and M.B.,

Respondent-Appellants.

Appeal from the District Court of Larimer County
Honorable William F. Dressel, Judge
No. 94 JV 179

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE JONES
Kapelke and Roy, JJ., concur

Harden, Schmidt, Hass, Haag & Hallberg, George H. Hass, County Attorney, Linda K. Connors, Assistant County Attorney, Fort Collins, Colorado, for Petitioner-Appellee

Liggett, Smith & Williams, P.C., Michael D. Liggett, Fort Collins, Colorado, for Respondent-Appellant M.A.

R. William Wawro, Fort Collins, Colorado, for Respondent-Appellant M.B.

THE APPELLANT-M.A., by and through his attorneys, Liggett, Smith & Williams, P.C., Michael D. Liggett, hereby requests that this Honorable Court Review the judgment entered on July 31, 1997, affirming the decision

of the Honorable William F. Dressel. The appellant-M.A. urges the Court of Appeals to review the following argument which the appellant believes the Court may have misapprehended or misunderstood.

A. The Court found no error in the appellant-M.A.'s argument that the requirements of the Treatment Plan had not been identified at the time the Motion to Terminate was filed. The appellant-M.A. requests the Court to recall that while the Treatment Plan had been ordered by the trial court, at the time of the filing of the Motion to Terminate, its initial phase of evaluations had not yet been completed. In order for the Respondent-M.A. to comply with the requirements of a Treatment Plan, the evaluations ordered should be completed so that the Respondent-M.A. had knowledge of all expectations of the People for his compliance.

In addition, the Court will recall that the Treatment Plan as adopted did not reflect the "real" Treatment Plan required by the Department of Social Services. The testimony at trial revealed that the "real" Treatment Plan required the Respondent-M.A. to admit that he had sexually abused his daughter.

It is impossible for Respondent-M.A. to have fair notice of the People's expectations for compliance of a Treatment Plan before such requirements have been formally identified pursuant to the Court ordered Treatment Plan. This failure in effect denies the Respondent-M.A. the fair procedures required for the protection of a fundamental liberty.

B. The Court found that the Respondent-M.A. was not prejudiced by his failure to admit to sexually abusing

his daughter. In this situation the Respondent-M.A. urges the Court to reconsider how this failure to admit was integral to the expectations of the People. The testimony at trial revealed that the Department of Social Services, through its caseworker, expected the Respondent-M.A. to admit that he had sexually abused his daughter. This expectation was in fact part of the "real" Treatment Plan that was the basis for the actions of the Department of Social Services.

The Department of Social Services believed that unless the Respondent-M.A. admitted to sexually abusing his daughter, there could be no effective therapy or treatment.

The Court further found that it was the Respondent-M.A.'s responsibility to assure compliance and success of the Treatment Plan. The Respondent-M.A. agrees with this position, however, the Respondent-M.A. must have fair knowledge of the expectations of the Department of Social Services. It is true that the September 1995 evaluation recommended ongoing treatment. It is also true that the Department of Social Services, through its own testimony, revealed that it never made a recommendation for treatment. It appears that their failure to recommend is based upon the fact that they did not believe there could be treatment without an admission. It is true that the Respondent-M.A. did not seek treatment. However, it is required that treatment be recommended, whether the Respondent-M.A. agreed or disagreed with the evaluations and its recommendations. In order to terminate the parent child relationship, the fair procedure requires at least a recommendation for the treatment required by the People.

C. The Court rejected the Respondent-M.A.'s contention that the Department of Social Services should have referred him to specific therapists for treatment.

The Court in its opinion points out that the record revealed that the Department of Social Services referred the Respondent-M.A. to a treatment facility for evaluation and that the facilities were to arrange for treatment providers. The Respondent-M.A. differs with the Court's reading of the record and the Treatment Plan. Nowhere in the record does testimony or evidence appear that the facilities performing the evaluations had the obligation to arrange for treatment providers or even make said recommendations. Throughout the Respondent-M.A.'s performance under the Treatment Plan, the Department of Social Services consistently demanded that they be involved in the recommendations of treatment providers. In fact, the Respondent-M.A. had to return to Court in order to have alternative treatment providers made part of the Treatment Plan.

D. The Court rejected the Respondent-M.A.'s contention that the trial court should have entered less drastic alternatives as part of its orders. While the primary consideration in a termination proceeding is the interest of the child, the Court should not disregard the Respondent-M.A.'s constitutionally protected right in the parent-child relationship. In the case at hand, the Department of Social Services believes that the only possibility of successful treatment demanded an admission of sexual abuse by the Respondent-M.A.

The Respondent-M.A. was placed in a situation where he must either falsely admit the commission of

sexual assault, although no criminal proceeding was ever filed or prosecuted, or have his parental rights terminated. This is a position from which there is no rational escape.

In order for the Court to balance the needs of the child and the rights of the Respondent-M.A., the Court should have required an *honest* Treatment Plan. This honesty would have required the Respondent-M.A. to either succeed or fail based upon the real expectations of the parties. In the case at hand, he never had fair notice of the actual requirements of the Treatment Plan or an opportunity to comply.

SUMMARY

Based upon the above, the appellant-M.A. respectfully requests and urges the Court of Appeals to reverse the judgment entered on July 31, 1997 and enter such orders as may be appropriate in this matter.

Dated this 13th day of August 1997.

Respectfully Submitted,

/s/ Michael D. Liggett
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Certificate of Mailing

I hereby certify that I have served a true and correct copy of this PETITION FOR REHEARING by placing a copy of the same in the U.S. mail, postage prepaid and properly addressed to the following this 13TH day of August 1997.

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/s/ Meredith Fink

APPENDIX "E"

SUPREME COURT, STATE OF COLORADO

CASE NO. 97 SC 800

PETITION FOR WRIT OF CERTIORARI

M.A.,

Petitioner,

IN THE INTEREST OF K.A., A Child,

and

THE PEOPLE OF THE STATE OF COLORADO,

Respondent

COLORADO COURT OF APPEALS Case No. 96 CA 740
DIVISION IV
Opinion by JUDGE JONES
Kapelke and Roy, JJ., concurred

Appeal from the District Court of Larimer County
Case No. 94 JV 179
The Honorable William F. Dressel

Submitted by:

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Petitioner, by and through his attorneys, Michael D. Liggett and Amy K. Rosenberg of Liggett, Smith & Williams, pursuant to C.A.R. 49 *et seq.*, seeks the issuance of a Writ of Certiorari to review the judgment of the Colorado Court of Appeals in Case No. 96 CA 740.

For purposes of clarity, Petitioner, called the "Respondent-Appellant" before the Colorado Court of Appeals, will be called "M.A." Respondent, the People of the State of Colorado, designated as Petitioner-Appellee in the Court of Appeals, will be called "The People."

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The District Court of Larimer County, Colorado, through the Hon. William F. Dressel, entered an order on January 31, 1996, terminating the Parent-Child Legal Relationship between M.A. and his child, K.A. The Colorado Court of Appeals upheld the termination based on the Trial Court's finding of noncompliance with one element of the court-approved treatment plan, specifically that M.A. failed to secure treatment as a perpetrator of sexual abuse. The Court of Appeals found that the Trial Court's termination was not based on an unstated requirement that M.A. admit to having sexually abused K.A.

The record, however, demonstrates the following: that M.A. underwent evaluation as required by the treatment plan; that the plan called for M.A. to undergo treatment with an appropriate therapist, but the Larimer County Department of Social Services did not make a referral for such a therapist; that no referral was made because M.A. had not admitted that he had sexually abused K.A.; and

that the stated treatment plan adopted by the Trial Court did not require M.A. to make such an admission.

Based on the facts established in the record and the imposition of the unstated requirement that M.A. admit to having sexually abused his child, M.A. was denied due process of law required by Sec. 1 of the Fourteenth Amendment of the Constitution of the United States and Article II, Sec. 25 of the Constitution of the State of Colorado. Copies of the Fourteenth Amendment to the United States Constitution and Article II, Sec. 25 of the Constitution of the State of Colorado are attached to this petition as Appendix I and Appendix II, respectively. Furthermore, imposition of the unstated requirement of an admission is inconsistent with C.R.S. 19-3-604(1)(c), which requires a finding of noncompliance with an appropriate treatment plan. A copy of the statute is attached hereto as Appendix III.

The Trial Court and the Court of Appeals must consider less drastic alternatives to termination, considering the physical, mental and emotional conditions and needs of the child. C.R.S. Sec. 19-3-604(3). (See Appendix III.)

M.A. urges the Court to grant this Petition for Writ of Certiorari because of the overwhelming importance of the issues before the Court: termination of the parent-child legal relationship and the due process required before that termination may occur. Resolution of the issues will be of substantial benefit to individuals whose parental relationship is threatened and will provide guidance to lower courts faced with conforming their orders to requirements of controlling statutes and constitutional provisions.

II. OPINION OF THE COURT OF APPEALS

This petition seeks review of the decision of Division IV of the Colorado Court of Appeals in Case No. 94 JV 179. The opinion was written by Judge Jones with concurrences by Judges Kapelke and Roy. A copy of the opinion is attached hereto as Appendix IV.

III. JURISDICTION OF THE COLORADO SUPREME COURT

Petitioner invokes the jurisdiction of the Colorado Supreme Court pursuant to C.A.R. 49 *et seq*. The judgment sought to be reviewed was entered by the Colorado Court of Appeals on July 31, 1997. The Petition for Rehearing was denied on October 2, 1997. A copy of the order denying rehearing is attached as Appendix V.

IV. STATEMENT OF THE CASE

The People filed a Petition for Dependent or Neglected Child, alleging that K.A.'s environment was injurious to her welfare. The Larimer County Department of Social Services was granted temporary custody of K.A. After a hearing on a proposed treatment plan, the Trial Court on February 10, 1995 adopted a treatment plan. On July 26, 1995, The People filed a Motion to Terminate the Parent-Child Legal Relationship. The People alleged that M.A. had failed to comply with the court-adopted treatment plan; that M.A. was an unfit parent; that his conduct was unlikely to change within a reasonable time; that there were no modifications to the treatment plan

available; and that there were no less drastic alternatives available.

Following a hearing on a permanency plan, the Trial Court on August 4, 1995, entered written orders requiring The People to continue to make reasonable efforts to reunify the child and her family. On August 10, 1995, M.A. filed a Response to Motion to Terminate, denying the People's allegations. Following trial from January 22 to January 24, 1996, the District Court of Larimer County on January 31, 1996 entered an order terminating M.A.'s parental rights.

V. ARGUMENT

The issues before the Court are interrelated and clear. Termination of the parent-child legal relationship constitutes a deprivation of M.A.'s fundamental liberty interest. Such a deprivation may occur only if The People afford sufficient and appropriate due process to M.A. If The People may impose requirements of a treatment plan, The People must clearly state them so that M.A. can comply; The People may not properly impose treatment plan requirements that are undisclosed to M.A. The People cannot require an individual threatened with termination of his parental rights, or any other individual, to admit to something he has not done.

The Trial Court adopted the Treatment Plan in question on February 10, 1995 after a dispositional hearing. C.R.S. Sec. 19-3-508(1) requires the Court to approve an appropriate treatment plan as part of the dispositional phase of a neglected or dependent child action, unless the Court finds that an appropriate treatment plan cannot be

devised for a particular respondent. (C.R.S. Sec. 19-3-508(1)(e)(I), attached as Appendix VI.) The purpose of a treatment plan is to help preserve the family by remedying issues that led to the filing of an action to terminate the parent-child legal relationship. *People in Interest of E.H.*, 837 P.2d 284 (Colo. App. 1992). A treatment plan's provisions must be designed to assist in identifying and overcoming the problems that led to the adjudication of the child as dependent and neglected. *People in Interest of A.G.-G.*, 899 P.2d 319 (Colo.App.1995).

At the January 1996 trial that ended in termination of the parent-child legal relationship, Nancy Roath, the ongoing caseworker for Larimer County Department of Social Services, stated that it was her position that M.A. must admit that he had sexually abused K.A. and seek therapy before the family could be reunited. She further testified that she had formed this opinion in July, 1994 (before the proposed treatment plan was filed with the Court). (Record, Vol. V, p. 190, ll. 7-16, Vol. V, p. 191, ll. 9-15; Vol. V, p. 192, ll. 1-4).

The requirement that M.A. admit he had sexually abused his child was never made a part of the treatment plan approved and ordered by the Court, nor was it proposed as a portion of that plan. If it had been included, M.A. would have had the opportunity to contest its inclusion.

The parent-child relationship constitutes a fundamental liberty interest. *B.B. v. People*, 785 P.2d 132 (Colo. 1990) and a parent's interest in maintaining the stability and autonomy of the family is constitutionally protected.

Watso v. Department of Social Services, 841 P.2d 299, 306 (Colo. 1992).

The State of Colorado may not deprive an individual of life, liberty or property without due process of law. U.S. Const. Amend. XIV, Sec. 1.; Colorado Constitution, art. II, Sec. 25. Due process requirements of the Fourteenth Amendment applying termination proceedings. *Overturf v. District Court of the 20th Judicial District*, 602 P.2d 850 (Colo. 1979). The due process afforded must adequately protect the interest at issue. *People v. Kibel*, 701 P.2d 37, 43 (Colo. 1985). The basic requirement of due process is fundamental fairness. *Watso, supra.* at 307. The person whose interest is being deprived should receive notice of the government's action and have an opportunity to respond. (1982), the Supreme Court held that "when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair process" and noted that a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is a "conmmanding" one.

Imposition of an unstated requirement is, in fact, fundamentally unfair and affords no adequate notice regarding the action required of M.A. to conform to the treatment plan. The parent-child legal relationship should not be terminated on the basis of requirements with which M.A. cannot comply, of which he is not aware and to which he cannot respond.

The Court of Appeals stated that its review of the record shows that the Trial Court's finding of noncompliance was based on M.A.'s failure to secure treatment, rather than a surreptitious requirement that he admit to

having sexually abused the child. The evidence reflects that M.A., did, in fact, comply with the treatment plan when he underwent a sexual abuse evaluation. But the evidence also shows the Larimer County Department of Social Services made no recommendation regarding a therapist to see M.A. because the Department did not know of any therapists who worked with individuals in denial. (Vol. V, p. 184, l. 11 through Vol. V, p. 185, l. 5; Vol. V, p. 203, ll. 21-25.) The People, through the Department of Social Services, then, set forth a treatment plan that required ongoing therapy for M.A., but failed to direct him to a therapist because the Department already had assumed M.A. committed sexual abuse and decided that he should admit to it.

The Court of Appeals' finding that M.A. failed to comply with the critical element of the treatment plan overlooks the fact that he could not comply with it. Even if the Department of Social Services had referred him to a therapist, he could not admit to sexually abusing K.A. if, in fact, he had committed no such abuse. M.A. has never been charged with any criminal offense relating to sexual abuse.

The Trial Court further found that the treatment plan could not be modified and that no less drastic alternatives to termination existed. However, this finding was premature because The People did not make a referral to M.A. for a therapist after M.A. underwent the required sexual abuse evaluation, although the treatment plan called for such a referral. M.A. asserts that there was no treatment plan with which he could fully comply because of its unstated requirement that he admit to having sexually abused his child. It is inherently unjust to hold M.A.

responsible for complying with the terms of a treatment plan that were, in some part, unstated, and then to base, in any part, termination of his parental relationship on his failure to comply with that plan.

V. CONCLUSION

The orders entered by the Trial Court and the Court of Appeals create an unsupportable situation for M.A. and indeed, for any person faced with termination of a parent-child legal relationship. They support the use of an unstated requirement as part of the treatment plan, and fail to inform the parent of what is required of him, despite the statute's clear intent that a treatment plan be specifically set forth. Further, that unstated requirement assumes behaviors that are not proven and seeks admissions regarding acts that M.A. denies and for which he has never been charged.

WHEREFORE, M.A. respectfully requests that the Court review the opinion of the Colorado Court of Appeals in this case by way of granting this petition.

Dated this 29 day of October, 1997.

Respectfully submitted,

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Appendix I: 14th Amendment, U.S. Constitution i

Appendix II: Article 2, Sec. 25, Colorado Constitution iii

Appendix III: C.R.S. Sec. 19-3-604(1)(c) iv

Appendix IV: Court of Appeals Opinion vi

Appendix V: Denial of Petition for Rehearing xiv

Appendix VI: C.R.S. Sec. 19-3-508 xv